

Guidance for decision makers where an individual raises concerns or makes a request about the use of their personal information

Introduction

- 1** The purpose of this guidance is to maintain consistency in the approach taken by GMC decision makers when considering whether, in a GMC fitness to practise enquiry or investigation, we should proceed to use an individual's personal information, including confidential personal information, where that individual has raised concerns or made a request about our use of their information. This decision will often relate to the use of the personal information of a complainant, or a patient who is not the complainant. It could also relate to the doctor under investigation or a third party. It supports consistent and fair decision making in relevant cases.
- 2** The decision as to whether we can proceed to use personal information where an individual has raised concerns or made a request cannot be predetermined by the application of a set of standard criteria. Instead, each case must be considered on its own merits and issues relating to disclosure and redaction must be considered every time.

When will a decision be required?

- 3** Whenever we use someone's personal information we must be able to demonstrate that we have had appropriate regard to our legal obligations. The question we are considering is whether we can use the individual's personal information when we are looking into a concern raised about a doctor's fitness to practise. In practice this primarily arises when we seek to disclose personal information externally to third parties but will also be relevant when we request personal information, such as medical records.

- 4 It is essential for us to ensure we are complying with our legal obligations whenever we receive new information that we wish to disclose to a third party. This will usually arise when the information meets the threshold for investigation but it may also arise at triage when conducting a provisional enquiry.
- 5 Before disclosing an individual's personal information, we should inform them how it will be used in our fitness to practise processes and give them an opportunity to let us know if they have any concerns or specific requests about that use unless it is impracticable or undesirable to do so for some reason in the public interest. Where the individual raises concerns or makes a specific request about the use of their information we will need to take this into account. This principle applies regardless of where the information comes from (that is whether it has been received from the data subject, usually as a complaint from a member of the public, or from a third party who is not the data subject, such as an employer, the police or other public body).
- 6 Where an individual raises concerns about the use of their personal information in the course of an enquiry or investigation, an Assistant Registrar (AR) decision should be made. The concerns raised could relate to us disclosing personal information or requesting personal information.
- 7 We will usually rely on our powers under s35A of the Medical Act to require information such as patient medical records. However if an individual raises concerns about us obtaining such information, we will need to consider if, in light of the concerns raised, it is in the public interest to go ahead and use our powers to request that information.
- 8 Where an individual makes a specific request about the use of their personal information, this should be discussed with an investigation manager and a view taken as to whether an AR decision is needed. For example, if an individual requests that we delay disclosure of their personal information for two weeks pending a specific event, this is something that the investigation manager might be able to agree without the need for an AR decision.

Guiding principles

- 9 Disclosure of personal information (including sensitive personal information) can be justified provided we act in accordance with the guiding principles outlined in *Guiding principles on using personal information when considering concerns*.

- 10** Personal information commonly used in fitness to practise investigations includes information such as an individual's name, date of birth, address and NHS number. The content of an individual's medical records are sensitive personal information. All references to personal information throughout this guidance should be taken to include sensitive personal information.
- 11** Whenever we use personal information we must be satisfied that we have acted in accordance with our legal obligations in respect of:
- a. a data subject's rights under data protection law;
 - b. an individual's right to respect for private and family life under Article 8(1) of the European Convention on Human Rights (ECHR);
 - c. our duty of confidence (which applies to both living and deceased patients).
- 12** We should ensure that at all times we only disclose information that is **necessary** and **proportionate** to the purpose of disclosure i.e. the information is relevant to enable the doctor, employer, expert, etc. to understand the allegations so that they can fulfil their role as relevant to the discharge of our statutory function.
- 13** Taking steps to minimise interference with an individual's rights will include the need to redact identifying information where appropriate. The need to inform an individual about how their personal information will be used and give them an opportunity to raise concerns or make a request about that use cannot usually be avoided by redaction. The doctor will generally need to know the identity of the individual (particularly in the case of a patient) in order to be able to respond to the allegations, although redaction may still be appropriate in some circumstances.

Special considerations where the individual may not be able to raise concerns or make a request about the use of their personal information

- 14** Concerns or requests about our use of personal information can only be raised or made by the individual whose information we are using or by someone with authority to act on their behalf. This means that if a complainant is writing on someone else's behalf, we either need confirmation of the authority of the complainant to express

views on the individual's behalf, or we need to communicate directly with the individual.

Lack of capacity

- 15** If there are concerns about an individual's capacity to understand how we are going to use their personal information and let us know if they have concerns or requests about that use, we may need to communicate with someone on their behalf. In considering this issue, staff should follow the *Guidance to staff on communicating with patients and the people close to their care*.

Deceased persons

- 16** For data protection legislation to apply the individual detailed in the complaint or referral must be an identifiable living individual. If the individual is deceased, they are not a data subject so data protection legislation and Article 8 of the ECHR will not apply. However, we are still bound by a duty of confidence and this will need to be considered before we share their personal information.
- 17** Usually in a fitness to practise enquiry or investigation, a breach of our duty of confidence can be justified in light of the GMC's statutory responsibilities to disclose information, where the disclosure is in the public interest. However, if in the specific circumstances of the case you are contacting a person close to the deceased person's care, please follow the *Guidance to staff on communicating with patients and the people close to their care*.
- 18** In these cases, we will also need to consider whether we need to use the personal information of any other individuals associated with the complaint or referral.

Anonymous and confidential complaints

- 19** Where there is an anonymous or confidential complaint, please follow our guidance on *Anonymous and confidential complaints*.

Decision on whether to proceed to use personal information in an investigation

- 20 Any use, or continued use, of personal information where concerns have been raised will require a decision as to whether the proposed use is:
- a) **necessary**; and
 - b) **proportionate**.
- 21 The GMC's statutory obligation to investigate fitness to practise concerns and its overarching objective to protect the public must therefore be balanced against the extent of any likely interference with the individual's rights under data protection law, Article 8 of the ECHR and the duty of confidence owed to them.
- 22 Case law makes it clear that the use of personal information will be justified if it is a proportionate response in light of our regulatory function and the overarching objective; protecting patients, maintaining public confidence in the profession and declaring and upholding proper standards of conduct and behaviour.
- 23 The principles of the over-arching objective are closely related to the term 'public interest': striving to achieve the objectives set out within the overarching objective is in 'the public interest'.
- 24 The public interest has two elements: the particular need to protect individuals and a collective need to maintain the confidence of the public in their doctors (Merrison Report). It is well established that there is an important distinction between what is in the public interest, and what is interesting to the public or subject to public clamour, especially in the media.
- 25 When considering the public interest, the GMC should also not be unduly influenced by the private interest of the maker of the allegation.
- 26 In order to inform the judgment made by the decision maker as to whether we can proceed to use personal information in the course of an enquiry or investigation in light of any concerns raised by the individual or on the individual's behalf, the following factors should be weighed and balanced:

Factors weighing in favour of using personal information

a The seriousness of the allegation.

Is the allegation such which, if proven, would result in action being taken against the doctor's registration? The GMC receives a range of allegations, from the less serious to the very grave. When considering seriousness, the decision-maker is entitled to have regard not only to the nature of the allegation(s) but also to the particular facts and circumstances which underlie them.

Weight should be given to the fact that investigations play a critical role in our regulatory function by enabling us to gather information to decide what action is necessary to protect patients or uphold public confidence. Aggravating factors may include, but are not limited to:

- A particularly serious departure from the principles set out in Good Medical Practice (GMP) where the behaviour is fundamentally incompatible with being a doctor;
- A deliberate or reckless disregard for the principles set out in GMP and/or patient safety;
- Doing serious harm to others (patients or otherwise), either deliberately or through incompetence and particularly where there is a continuing risk to patients;
- Abuse of position / trust;
- Violation of a patient's rights / exploiting vulnerable people;
- if the doctor abused his position of trust particularly in the case of a vulnerable patient;
- Offences of a sexual nature, including involvement in child pornography;
- Offences involving violence;
- Dishonesty, especially where persistent and / or covered up;
- Putting their own interests before those of their patients;
- Persistent lack of insight into the seriousness of their actions or the consequences.

The decision maker should refer to the Sanctions Guidance which provides an up to date (but non-exhaustive) list of factors that indicate that erasure might be appropriate and thus provide a guideline on gravity.

b The risk of prejudice to the doctor.

Will it be possible to have a fair and just inquiry to resolve the issues raised by the allegation(s) if the individual's personal information is not used? For example, is there a risk of prejudice through an inability to cross examine the complainant should the information not be disclosed to the doctor?

- c The extent of any continuing unwarranted risk to the public and / or to public confidence in the medical profession.

Is the doctor still practising or practising in the same specialty, for example?

In some cases the doctor will have previous disciplinary history with the GMC, either in the form of proven or unproven allegations. Generally, a doctor's fitness to practise history can be taken into account when it is relevant to the current decision and fair in the circumstances for that history to be considered. However, the decision-maker must guard against relying on unfounded allegations when seeking to quantify any continuing risk when determining the question of whether it would be in the public interest to proceed to use the individual's personal information in the enquiry or investigation.

Relevant considerations to the question of whether to take a doctor's fitness to practise history into account are set out in the *Guidance for decision-makers on when to take a doctor's fitness to practise history into account* and include:

- the nature of any such allegations;
- any similarities or common features;
- whether they appear to create a pattern of behaviour;
- whether they were proven or unproven;
- what steps were taken in respect of unproven allegations and why (it may be necessary for a closed allegation to be revisited under rule 12 which is a separate decision for the Registrar).

When assessing continuing risk, the decision-maker should take into account any restrictions in place on the doctor's registration and whether this guards against the risk presented by the current allegation.

- d Whether the allegation raises an important point of practice or principle/ethics.
- e Adverse publicity or high profile such that failure to proceed would undermine public confidence.

Whether there has been previous investigation or airing of an allegation will be relevant to the public's confidence in the profession. Normally, the more the matter has already been considered, the less compelling is the argument for the GMC to consider the allegation. However this will not be the case where:

- another body has made findings critical of the practitioner; and/or
- another body has recommended that the GMC should become involved; and/or
- there is a perceived need to protect the public from a practitioner who continues to practise.

Factors weighing against using personal information

- a** The GMC would be incapable of evidencing the concerns without the cooperation of the individual.

Consideration should be given to the GMC's ability to rely on alternative material, such as a police reports, medical records, an expert report or other direct witness evidence, to evidence the allegation(s). Where the individual is the sole witness, they have refused to cooperate with the GMC and no other evidence would be sufficient to build a case, use of the individual's personal information is unlikely to be justified, on the grounds that without the assistance of the individual it will be very difficult to establish evidence of impairment.

Where there has been a police investigation, or any other investigation or enquiry, the substantive reason(s) for the outcome should be established; for example if the police decided not to charge the doctor with any offence and to take no further action, why was that? This is likely to be relevant to the decision-makers consideration of whether the GMC is capable of evidencing the allegation(s) some other way. In these instances it is important to bear in mind that the standard of proof applied in criminal courts is beyond reasonable doubt, which is higher than the civil standard of proof- the balance of probabilities- which applies in GMC proceedings.

- b** Any risk to the individual if the GMC were to proceed to use, and in particular disclose, their personal information.

The degree of the harm should be considered; it is likely that only a real risk of harm, rather than, for example distress, could weigh significantly against the wider risk to patients and the public should the GMC not use the personal information to support an enquiry or investigation into the allegation(s).

Where the individual has requested confidentiality we should weigh the reason(s) for this against the public interest.

- 27 The weight to be attributed to each of the factors above is to be assessed by the decision-maker on a case by case basis. The considerations are likely to have a cumulative impact, with no single one being decisive. The decision-maker's reasons should identify each of the factors which lead to the conclusion that use of the individual's personal information in our enquiry or investigation is, or is not, needed in pursuit of the overarching objective.
- 28 Provided the decision-maker is satisfied that use of the personal information is **necessary** in order for the GMC to fulfil its statutory obligation to investigate fitness to practise concerns, the resulting interference with the individual's right under data protection legislation, Article 8 of the ECHR and the duty of confidence is likely to be justified (see the *Guiding Principles on using personal information when considering concerns* for further detailed explanation).
- 29 The decision-maker should also turn their mind to identifying any steps / measures required to ensure that the use of the personal information, including any necessary disclosure to third parties, is proportionate. For example, the redaction of certain non-essential contextual information.
- 30 Provided we take all reasonable steps to minimise any interference with the individual's rights, then the use of personal data is likely to be upheld as **proportionate**.
- 31 Where an individual has raised concerns or made a request about the use of their personal information, they should be informed of any decision to proceed to use their personal information where it will lead to disclosure to a third party, unless there is a good reason in the particular circumstances of the case not to do so, for example it is impracticable or undesirable for some reason in the public interest.